> according to the rules of the common law.

U.S. Const., amend. XIV, § 1 states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd is set out in the appendix. App. 53a.

M.C.L. 600.1483 is set out in the appendix. App. 63a.

STATEMENT OF THE CASE

On October 10, 1998, Kelly Snider Smith sustained a broken left leg in a rollover car accident. 419 F.3d at 515. Mr. Smith was taken to Botsford General Hospital (Botsford), which diagnosed him as having an open comminuted left femur fracture. *Id.* The parties stipulate this was an emergency medical condition under EMTALA. 6th Cir. Jt. App. at 1239.

After placing a splint on Smith's leg, Botsford decided to transfer him to the University of Michigan (U of M) Hospital, which was approximately 40 miles away. 419 F.3d at 557. While Botsford claimed Smith's fracture was stable and he had "limited bleeding," Botsford Brief at 7, before transfer, a nurse charted that his leg was "spurting" blood. 6th Cir. Jt. App. at 689. Moreover, when the ambulance

arrived to transport Mr. Smith, the senior EMT found that the bones in Smith's leg were "snapping" and "popping" and that he was losing "copious amounts of blood." *Id.* at 615-16.

The EMT notified the treating doctor the patient did not appear stable for transport. *Id.* at 617-18. Notwithstanding, the doctor ordered her to take Smith to U of M Hospital. *Id.* at 620. During transport, Mr. Smith went into cardiac arrest. *Id.* at 632. He was later pronounced dead. The autopsy concluded that Smith died from extensive blood loss. *Id.* at 471.

On March 23, 2000, the Personal Representative of Smith's Estate (Smith), filed an EMTALA action against Botsford in the Eastern District of Michigan. Smith specifically alleged that Botsford violated 42 U.S.C. § 1395dd(c)(1) by transferring the decedent before his condition was "stabilized within the meaning of (EMTALA subsection) (e)(3)(b)." Complaint, ¶ 22A; App. 50a. The district court had federal question jurisdiction under 28 U.S.C. § 1331.

Before trial, Smith moved to strike Botsford's affirmative defense under Michigan's medical malpractice damage cap, M.C.L. 600.1483, arguing that this EMTALA action is not a medical malpractice claim. 6th Cir. Jt. App. at 189-94. Smith also argued that the cap, if applicable, violates the U.S. constitutional rights to a jury trial and equal protection. *Id.* at 197-204.

In a May 28, 2002 Memorandum and Order, while reserving its ruling on the cap, the district court stated that an EMTALA action is "not predicated on a finding that the hospital violated a

professional standard of care" and that this case does not sound in medical malpractice. App. 21a.

Following a lengthy trial and jury verdict, on May 1, 2003, the district court entered a judgment in Smith's favor of $5,035,000.00. App. 42a. Botsford moved to reduce the alter and amend the judgment under M.C.L. 600.1483. (6th Cir. Jt. App. at 273). Smith reiterated the arguments previously raised in the motion to strike Botsford's affirmative defense. *Id.* at 382-96.

In a February 9, 2004 Decision and Order, the district court denied Botsford's motion to alter and amend the judgment, holding that Michigan's medical malpractice cap does not apply in this EMTALA action. App. 35a-39a. Noting that "[t]here is a sharp distinction between a medical malpractice claim and a claim under EMTALA" and "significant differences in the findings required by a jury to succeed" in each cause of action, the district court held that application of "the medical malpractice cap into an EMTALA action would impose a judge-made limitation not called for by the statute." App. 38a-39a. Finding the cap inapplicable, the district court did not address the constitutional issues.

Botsford appealed to the Sixth Circuit. In addition to other arguments, Botsford asserted that M.C.L. 600.1483 applies. Smith replied that the cap does not apply in this EMTALA action and, if somehow applicable, would violate the right to jury trial under the Seventh Amendment and the equal protection clause of the Fourteenth Amendment. Smith Brief at 19-38. Given the importance of the issues, three organizations filed amicus briefs on behalf of the parties.

On August 18, 2005, the Sixth Circuit issued a published decision reversing the district court's ruling that Michigan's medical malpractice cap did not apply. App. 2a. The Court relied on the Michigan Supreme Court's test for determining "whether the nature of the claim is ordinary negligence or medical malpractice." App. 10a (citing *Bryant v. Oakpointe Villa Nursing Center*, 684 N.W.2d 864, 869 (Mich. 2004)). Under that test, a claim sounds in medical malpractice rather than ordinary negligence if it (1) "pertains to an action that occurred during the course of a professional relationship;" and (2) "raises questions of medical judgment beyond the realm of common knowledge and experience." *Id.* (citing *Bryant* at 871).

After correctly noting that the case at bar arose "during the course of a professional relationship," the Court framed Plaintiff's "objection to the classification of her claim as a medical malpractice action" as the argument that this case "does not raise questions of 'medical judgment.'" App. 11a. Citing EMTALA's definition of "to stabilize," the Court held that this claim "entails medical judgment" and constitutes a medical malpractice action under Michigan law. App. 12a (citing 42 U.S.C. § 1395dd(e)(3)(A)). It concluded that "Michigan's cap on malpractice limits Plaintiff's non-economic damages to $359,000.00." *Id.*

Having found the medical malpractice cap applicable, the Court addressed Plaintiff's argument that the cap is an unconstitutional violation of the right to jury trial and equal protection. In a short analysis, the Court adopted *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989), which held that as long as a jury is permitted to determine "the extent of a plaintiff's injuries," a post-verdict limitation on those

damages is permissible. App. 13a. The Court also briefly dispatched Plaintiff's equal protection argument. Finding that a damage cap "does not violate a fundamental right or create a suspect classification," the Court applied only rational basis review. *Id.* (citing *Boyd*). Citing *Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich. App. 2002), the Court held that M.C.L. 600.1483 "survives rational-basis scrutiny." App. 14a. The Court reversed the district court's holding on the cap issue and remanded "for reduction of non-economic damages to $359,000.00 in accordance with Michigan law." *Id.*

Smith filed a timely petition for rehearing with a suggestion for *en banc* review. The Sixth Circuit denied Smith's petition for rehearing on November 22, 2005. App. 43a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S APPLICATION OF MICHIGAN'S "MEDICAL MALPRACTICE" DAMAGE CAP TO THIS EMTALA ACTION CONFLICTS WITH THE UNIVERSAL CONSENSUS OF FEDERAL COURTS THAT EMTALA ACTIONS DO NOT SOUND IN NEGLIGENCE OR MEDICAL MALPRACTICE.

The Sixth Circuit's application of Michigan's medical malpractice cap in this case misreads EMTALA and conflicts with the consistent holding of other U.S. circuit courts that EMTALA created statutory liability distinct from state negligence and medical malpractice claims. S.Ct. R. 10(a). If not reversed, the lower court's ruling will have profound ramifications not only on future plaintiffs' ability to recover compensatory damages, but on issues such as

federal question jurisdiction, EMTALA's definitions, pre-suit procedural requirements, and application of comparative negligence. The issue is an important question of federal law that should be settled by this Court. S.Ct. R. 10(c).

Congress passed EMTALA in 1986 "to prevent hospitals from dumping patients who suffered from an emergency medical condition because they lacked insurance . . ." *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133-34 (6th Cir. 1990). EMTALA requires a hospital to perform an appropriate screening and prohibits transfer of patients unless emergency medical conditions are stabilized within the meaning of the Act. 42 U.S.C. § 1395dd(a) and (b). The statute further provides, in pertinent part, that "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of [the Act] may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A); App. 58a.

EMTALA sets forth two distinct stabilization requirements. 42 U.S.C. § 1395dd(b)(1) generally requires the hospital to "provide such treatment as may be required to stabilize" the victim's emergency medical condition. App. 53a. The definition of "to stabilize" is "to provide such medical treatment of the condition . . . to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer . . ." 42 U.S.C. § 1395dd(e)(3)(A); App. 60a-61a.

42 U.S.C. § 1395dd(c)(1) prohibits a hospital from transferring a patient with an emergency

medical condition "which has not been stabilized." App. 54a. "Stabilized" means that "no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer . . ." 42 U.S.C. § 1395dd (e)(3)(B); App. 61a. As indicated, Smith alleges a claim under subrules (c)(1) and (e)(3)(B). Complaint, ¶ 22A; App. 50a.

It is universally established that an EMTALA action is utterly distinct from a state medical malpractice claim. Previously, in *Thornton*, 895 F.2d at 1133, the Sixth Circuit held that a civil EMTALA action triggers federal question jurisdiction because "[a] cause of action under the Act is not analogous to a state medical malpractice claim because it creates liability for a refusal to treat, which state medical malpractice does not." Other circuits uniformly hold that "EMTALA is not a substitute for state malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence." *Vickers v. Nash Gen. Hosp.*, 78 F.3d 139, 142 (4th Cir. 1996); *see also Summers v. Baptist Medical Center Arkadelphia*, 91 F.3d 1132, 1137 (8th Cir. 1996) (*en banc*) ("So far as we can tell, every court that has considered EMTALA has disclaimed any notion that it creates a general federal cause of action for medical malpractice in emergency rooms"); *Urban v. King*, 43 F.3d 523, 526 (10th Cir. 1994); *Gateway v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C. Cir. 1991); *Bryant v. Adventist Health Sys.*, 289 F.3d 1162, 1166 (9th Cir. 2002) (citations omitted) (EMTALA "was not enacted to establish a federal medical malpractice cause of action nor to establish a national standard of care."); *Cooper v. Gulf Breeze*

Hosp., Inc., 839 F. Supp. 1538, 1542 (N.D. Fla. 1993) (EMTALA is "not based on fault").

Instead of creating a fault or negligence-based standard, EMTALA provides for "strict liability." *St. Anthony Hosp. v. U.S. Dept. of Health and Human Services*, 309 F.3d 680, 705-06 (10th Cir. 2002); *Urban*, 43 F.3d at 525-26. Accordingly, state comparative negligence or fault principles are inapplicable in EMTALA actions. *Griffith v. Mt. Carmel Medical Center*, 842 F. Supp. 1359, 1365 (D. Kan. 1994) (EMTALA liability is not predicated on negligence, but on "the hospital's violation of a federal statute making the hospital strictly liable for any 'personal harm' that 'directly results' from the violation").

As for the specific allegations of this case, federal courts have repeatedly held that an EMTALA action alleging transfer before stabilization does not constitute a state negligence or malpractice action. *St. Anthony Hosp.*, 309 F.3d at 706-07; *Harry v. Marchant*, 291 F.3d 767, 773-74 (11th Cir. 2002); *Reynolds v. Maine Gen. Health*, 218 F.3d 78, 83 (1st Cir. 2000); *Bryan v. Rectors, Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996).

Despite universal authority that this EMTALA action does not sound in negligence or medical malpractice, the Sixth Circuit held that Michigan's medical malpractice cap, M.C.L. 600.1483, applies. As quoted above, EMTALA expressly incorporates "those damages available for personal injury" in the defendant hospital's state, not "those damages available for medical malpractice." 42 U.S.C. § 1395dd(d)(2)(A) Unlike several states, (*see* Decision and Order, p. 5 n.2; App. 34a), Michigan does not have a cap on "personal injury"

damages. Instead, Michigan's caps are limited to certain categories of actions. These are product liability claims, M.C.L. 600.2946a, rental car cases, M.C.L. 257.401(3), and medical malpractice actions, M.C.L. 600.1483. Michigan's medical malpractice cap states, in pertinent part:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for non-economic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed (two tiers of maximum recovery) . . .

M.C.L. 600.1483 (emphasis added); App. 63a.

Because EMTALA is not a negligence or malpractice action, courts have held "professional negligence" and "malpractice" caps inapplicable. *Jackson v. East Bay Hosp.*, 980 F. Supp. 1341, 1346, 1350 (N.D. Cal. 1997); *Burrows v. Redbud Comm. Hosp. Dist.*, 188 F.R.D. 356, 360 (N.D. Cal. 1997); *Jeff v. Universal Health Sevices, Inc.*, 2005 W.L. 2036893 (E.D. La. 7/27/05). In turn, with the exception of *Barris v. County of Los Angeles*, 972 P.2d 966 (Cal. 1999), which was wrongly decided, the cases that have applied caps to EMTALA actions have all involved statutes more broadly worded than M.C.L. 600.1483. *See, e.g., Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 861, 865-66 (4th Cir. 1994) (addressing cap that applied to "any tort based on health care or professional services rendered. . . ." (citing Va. Code. Ann. § 8.01-581)).

The Sixth Circuit's application of M.C.L. 600.1483 to this EMTALA action was therefore patently erroneous. Contrary to the Sixth Circuit,

Smith's stabilization claim is not a Michigan medical malpractice action under *Bryant v. Oakpointe Villa Nursing Center*, 684 N.W.2d 864, 869 (Mich. 2004). *Bryant* explained that its "medical judgment" test governs evaluation of whether the defendants meet "the standards of care . . . explained by experts." *Id.* at 872. In doing so, *Bryant* reiterated Michigan's traditional definition of medical malpractice as "the failure of a member of the medical profession . . . to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same manner or similar locality, in light of the present state of medical science." *Id.* (citation omitted).

The two-part *Bryant* test applies only "[i]n determining whether the nature of the claim is ordinary negligence or medical malpractice." *Id.* Because this EMTALA action is neither an "ordinary negligence nor medical malpractice" claim, the *Bryant* test is clearly inapplicable.

In addition, the Sixth Circuit mistakenly cited the definition of "to stabilize" in subrule (e)(3)(A) for the proposition that this is a Michigan medical malpractice action. App. 12a. To reiterate, Smith alleges that Defendant transferred the decedent before his condition was "stabilized" under subsection (e)(3)(B). Complaint, ¶ 22A; App. 50a.

EMTALA unambiguously provides that a hospital is liable for either failing "to stabilize" or transferring a patient before his or her emergency medical condition is "stabilized." *See above.* EMTALA's definitions do not transform this claim into a state malpractice action. *St. Anthony Hosp.*, 309 F.3d at 694; *Bergwall v. MGH Health Services, Inc.*, 243 F. Supp. 2d 264, 376 (D. Md. 2002) (citing

Vickers). Neither the definition of "to stabilize" or of "stabilization" creates a negligence standard of care. This is certainly true for the definition of "stabilized" under subrule (e)(3)(B) – which focuses on the patient's condition, not the treatment provided.

The Sixth Circuit decision not only conflicts with universal federal authority by applying a "medical malpractice" cap to an EMTALA action, but also fundamentally misreads EMTALA's civil action provision and two stabilization requirements. If permitted to stand, the Sixth Circuit's ruling will have a profound impact on future EMTALA actions. It not only wrongly deprives Michigan EMTALA plaintiffs a complete recover, but calls into question whether federal question jurisdiction under *Thornton* exists, the nature of EMTALA stabilization claims, the validity of cases holding that pre-suit medical malpractice procedural requirements do not apply, *Power*, 42 F.3d at 865-66 and whether comparative negligence remains irrelevant in this supposedly non-fault-based action, *see Griffith*.

II. THE SIXTH CIRCUIT'S APPLICATION OF MICHIGAN'S CAP TO EMTALA ACTIONS VIOLATES THE SEVENTH AMENDMENT.

The Sixth Circuit's holding that application of M.C.L. 500.1483 does not violate Smith's right to a jury trial conflicts with the decisions of several state supreme courts. S.Ct. R. 10(a). This is an important question of federal law which has not, but should be, settled by this Court. S.Ct. R. 10(c).

A. Application of the Cap Violates Plaintiff's Right to a Jury Trial under the Seventh Amendment.

The Sixth Circuit's application of M.C.L. 600.1483 to this EMTALA action violates Plaintiff's right to a jury trial under the U.S. Constitution. The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

"The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a).

"The right of trial by jury in civil cases," Chief Justice Rehnquist stated, "is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, C.J., dissenting). Indeed, it was the Federalists' commitment to add this right, in what became the Seventh Amendment, which won ratification of the proposed Constitution. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 599 (1993); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 146-47 (1991). The Supreme Court has repeatedly charged the federal courts with

the responsibility of ensuring that this fundamental right "shall be preserved":

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), *quoted in Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and *in Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). *See also, Jacob v. New York*, 315 U.S. 752, 753 (1943) ("The right of jury trial in civil cases . . . should be jealously guarded by the courts.").

The Seventh Amendment undoubtedly applies to Plaintiff's personal injury action for money damages under EMTALA. This Amendment guarantees the right of a jury trial in civil cases brought in federal court, including under diversity jurisdiction, and applies to actions enforcing statutory rights. *Byrd v. Blue Ridge Rural Electric Co-op, Inc.*, 356 U.S. 525, 536-37 (1958); *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974).

The phrase "Suits at common law" in the Amendment refers to "suits in which *legal* rights were to be ascertained and determined, in contradiction to those where equitable rights alone were recognized, and equitable remedies were administered." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (citation omitted; emphasis in original). The Amendment "thus applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law

causes of action ordinarily decided in English law courts in the late 18th century.'" *Id.* (quoting *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 42 (1989)); *see also Curtis*, 415 U.S. at 196 (monetary damages are the "traditional form of relief offered by the courts of law").

It is equally indisputable that, "[t]he right to a jury trial includes the right to have a jury determine the *amount* of statutory damages." *Feltner*, *supra*, at 353 (emphasis in original).[1] "[T]he common law as it existed at the time of the adoption of the Constitution" provided that "in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Dimick*, 293 U.S. at 480 (internal quotation marks omitted, comma added).

EMTALA's legislative history contemplates trial by jury. *See* H.R. Rep. No. 241(III), 99th Cong., 1st Sess. 28 (1986) (referencing "juries"). Reported EMTALA cases have consistently presumed a right to jury trial. *Power*, 42 F.3d 851 (appeal from jury verdict); *Romo v. Union Memorial Hosp., Inc.*, 878 F.Supp. 837 (W.D. N.C. 1995) (holding EMTALA claim presented a jury question).

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[1] The *Feltner* Court rejected as "inapposite" its decision in *Tull v. United States*, 481 U.S. 412 (1987), that, in an action by the government seeking civil penalties, a defendant was not entitled to a jury determination of their amount. In private actions, where the Seventh Amendment applies, the Court made clear, "if a party so demands, a jury must determine the actual amount of statutory damages." 523 U.S. at 355.

As a statutory claim authorizing recovery of damages for personal injury, EMTALA is analogous to common law actions existing when the Constitution was ratified. The Seventh Amendment accordingly guaranteed Plaintiff the right to jury trial in this EMTALA action, including the right to have a jury determine the amount of damages.

The Sixth Circuit's application of Michigan's medical malpractice cap to reduce the jury's verdict violated Plaintiff's right to a jury trial under the Seventh Amendment. The Supreme Court has not yet addressed the issue whether a state damage cap, as applied in a federal case, violates the Seventh Amendment. *See Gaspirini v. Center for Humanities, Inc.*, 518 U.S. 415, 429 n. 9 (1996). Recognizing that determination of damages is among a jury's most important functions, two district courts held Virginia's medical malpractice cap violated the Seventh Amendment right to a jury trial. *Boyd v. Bulala*, 672 F.Supp. 915, 920-22 (W.D. Va. 1987), *rev'd* 877 F.2d 1191 (4th Cir. 1989); *Reuwer v. Hunter*, 684 F.Supp. 1340, 1344 (W.D. Va. 1988). In addition, declaring that damage caps violate litigants' rights to a jury trial, numerous state supreme courts have held them unconstitutional. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 258 (Kan. 1985); *Smith v. Dept. of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987) (cap deprived plaintiff of "the constitutional benefit of a trial by jury"); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 720-24 (Wash. 1989) (striking down a cap on non-economic damages in all personal injury and wrongful death cases); *Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156, 164 (Ala. 1991) (cap on non-economic medical malpractice damages is "an impermissible burden on the right to a trial by jury"); *Lakin v. Senco Products, Inc.*, 987

P.2d 463, 473-75 (Or. 1999) (damage cap "interferes with the resolution of a factual issue" and therefore "violates the injured party's right to receive an award that reflects the jury's factual determination of the amount of damages"); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1090-91 (Ohio 1999) (holding that calculation of damages is within the exclusive province of the jury and cap violated right to jury trial); *cf. Lucas v. United States*, 757 S.W.2d 691-92 (Tex. 1988) (court's holding that damage cap violates constitutional "open courts" provision is supported by and "must be read in conjunction with the right of trial by jury"); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1080 (Ill. 1997) (suggesting but not deciding that reducing plaintiff's award without the option of a new trial violates right to jury trial).

In *Boyd*, District Judge Michael noted that the Seventh Amendment "protects the most fundamental elements of a jury trial," which integrally includes the jury's factual determination of damages. *Boyd*, 672 F.Supp. at 920, (citation omitted). Indeed, the Seventh Amendment precludes additur and substantially limits remittitur. *Id.* at 921. Judge Michael concluded that a state damage cap "infringes strongly on the fact-finding function of the jury in assessing appropriate damages." *Boyd v. Bulala*, 647 F. Supp. 781, 788-89 (W.D. Va. 1986), *reaffirmed*, 672 F. Supp. 915, 918-22 (W.D. Va. 1987). He accordingly held that the cap violates the Seventh Amendment because it "substantially diminishes the role of the jury in determining damages . . . where the proven damages far exceed the amount of the cap." *Id.*, 672 F. Supp. at 919.

The Fourth Circuit reversed the district court in *Boyd*, principally relying on the Virginia Supreme

Court's decision in *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (Va. 1989). *Boyd v. Bulala*, 877 F.2d 781, 1195-96 (4th Cir. 1989). *Etheridge* held that, since the trial court applies a damage cap "only after the jury has fulfilled its fact-finding function," the cap did not violate the jury trial provision in Virginia's constitution. 376 S.E.2d at 529. *Etheridge* rationalized that application of the cap involved "a matter of law, not a matter of fact." *Id.*

The Fourth Circuit fully embraced *Etheridge's* reasoning:

> True, it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries. As the *Etheridge* court pointed out, however, it is not the role of the jury to determine the legal consequences of its factual findings. That is a matter for the legislature, and here, the Virginia legislature has decided that as matter of law damages in excess of $750,000 are not relevant. In so doing it has not violated the seventh amendment. To paraphrase *Etheridge,* once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.

Boyd, 877 F.2d at 1196 (citations omitted). *Boyd* also concluded that a cap does not violate the right to jury trial, stating, "[i]f a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit

damages recoverable for a cause of action as well." *Id.*

The Sixth Circuit's cryptic decision adopts *Boyd*. *Smith*, 419 F.3d at 519. It also cites the Michigan Supreme Court's majority decision in *Phillips* v. *Mirac, Inc.*, 685 N.W.2d 174, 180 (Mich. 2004), which also followed *Boyd* and *Etheridge*.

The Sixth Circuit's uncritical reliance on *Boyd* is misplaced. Several decisions persuasively rebut *Boyd* and *Etheridge's* conclusion that a damage cap does not infringe on the jury's exclusive function of determining damages. In the particularly well-reasoned *Sofie*, the Washington Supreme Court charged that *Etheridge* had "bypassed" the constitutional right to a jury trial, "allowing it to exist in form but letting it have no effect in function." *Sofie*, 771 P.2d at 724. Several other State Supreme Courts disagree with *Etheridge*, and therefore *Boyd* and the instant Sixth Circuit decision:

- Oregon Supreme Court: *Etheridge* "ignores the constitutional magnitude of the jury's fact-finding province," and "pays lip service to the form of the jury but robs the institution of its function." *Lakin*, 987 P.2d at 473.
- Kansas Supreme Court: "It would be illogical for this court to find that a jury, empanelled because monetary damages are sought, could not then fully determine the amount of damages suffered." *Kansas Malpractice Victims Coalition*, 757 P.2d at 258.
- Alabama Supreme Court: "[W]e might be inclined to regard the argument as specious." *Moore*, 592 So.2d at 162.

- Ohio Supreme Court: "The right belongs to the litigant, not the jury, and a statute that allows the jury to determine the amount of . . . damages to be awarded but denies the litigant the benefit of that determination stands no better constitutional footing than one that precludes the jury from making the determination in the first instance." *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1091.

The above-cited state supreme court and federal district court cases articulate the more principled and persuasive position that a damage cap violates a plaintiff's right to a jury trial on the issue of damages. They demonstrate that *Etheridge*, *Boyd*, and the Sixth Circuit decision constitute result-oriented sophistry.

The Sixth Circuit also erroneously followed *Boyd* because the Fourth Circuit had relied on *Tull v. United States*, 481 U.S. 412, 426 n. 9 (1987), as indicating that "the right to a jury trial may not even extend to the remedy phase of a civil trial." *Boyd*, 877 F.2d at 1196 n. 5. As indicated above, in *Feltner*, the Supreme Court explicitly rejected this interpretation of *Tull*. *Feltner*, 523 U.S. at 355.

Finally, the Sixth Circuit mistakenly cited *Boyd*'s rationale that a legislature that "may completely abolish a cause of action without violating the right of trial by jury" may "permissibly limit damages recoverable for a cause of action as well." *Boyd*, 877 F.2d at 1196. At the outset, the Sixth Circuit overlooks that EMTALA is a federal claim, created by Congress. The Michigan Legislature certainly has no authority to abolish an EMTALA claim.

The Sixth Circuit and *Boyd* also confuse the power to create a cause of action with constitutional guarantees of due process. The legislature's power is broad, but not unbounded. It is limited by the Constitution itself and the rights the people have reserved to themselves. A legislature may not condition recovery on procedures so unfair as to deny a plaintiff due process. *See Logan v. Zimmerman Brush Co*, 455 U.S. 422 (1982) (regulation that foreclosed an employment discrimination claim if the state Fair Employment Commission has not acted within 120 days violated due process). Nor may Congress in the Bankruptcy Act provide that tort or contract claims to which the Seventh Amendment applies be litigated in a non-jury bankruptcy court. *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 42 (1989).

In *Scott v. Blue Springs Ford Sales, Inc.*, 136 S.W.3d 140, 142 (Mo. 2005), the Missouri Supreme Court reversed a lower court ruling that a new statute deprived plaintiffs of a jury trial on the issue of punitive damages. *Scott* roundly rejected that argument that "the power to create or abolish (a) cause of action" grants the legislature the power to eliminate the right to jury trial:

> This argument confuses the judicial process by which claims are determined with the substance of the claims themselves. Though, in general, the legislature is free to establish the substance of a claim, as, for instance, to allow or disallow punitive damages, it is not free to establish a procedure for adjudicating that substantive claim if the procedure contravenes the constitution. In short, a statute is not

> valid that provides for punitive damages but precludes a jury trial to determine those damages.

Id. Lakin similarly held that the legislature's power to abolish a cause of action does not permit it to pass a cap violating a litigant's constitutional guarantee of having a jury determine damages. *Lakin*, 987 P.2d at 474-75. Legislative authority over causes of action does not include authority to violate the constitutional right to trial by jury.

For the reasons presented, the Sixth Circuit's application of M.C.L. 600.1483 to this EMTALA action violates Smith's Seventh Amendment right to have a jury determine damages in this case. Plaintiff's petition should be granted and the Sixth Circuit's decision reversed.

B. Application of the Cap Violates the Reexamination Clause of the Seventh Amendment.

The Sixth Circuit's application of Michigan's damage cap to this EMTALA case not only infringes on Plaintiff's right to a jury trial, it also violates the second portion of the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." U.S. Const., amend. VII.

Justice Story ventured that the Reexamination Clause is even "more important" than the preceding portion of the Seventh Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). It prohibits "the indirect impairment of the right of trial by jury through judicial re-examination of

factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

As previously indicated, the Seventh Amendment forbids additur. *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935). "Remittitur is allowed only when the verdict cannot be justified upon the evidence, and only if the court affords the plaintiff the option of a new trial." *Boyd*, 672 F. Supp. at 921 (citing *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889)). In the absence of both elements, a federal court is without authority "to enter an absolute judgment for any other sum than that assessed by the jury." *Kennon*, 131 U.S. at 30.

The Sixth Circuit's application of M.C.L. 600.1483, which reduces Plaintiff's EMTALA verdict not based on insufficiency of the evidence, clearly violates the Reexamination Clause.

The Seventh Amendment Reexamination Clause has no counterpart in the constitutions of most states. *See, e.g.*, Mich. Const. 1963, art. I, § 14. Oregon's constitution, however, includes a similar provision. *See* Or. Const., art. I, § 17. The Oregon Supreme Court, in *Lakin*, held that a legislative cap on non-economic damages violates the state constitution's reexamination clause. *Lakin*, at 471-73.

A single federal appellate decision has held that the Reexamination Clause does not prohibit application of a state damage cap by a federal court. That case, *Davis v. Omitowoju*, 883 F.2d 1155, 1162 & n.11 (3d Cir. 1989), based its holding entirely on the proposition that the Reexamination Clause "speaks exclusively of the role of the court" and "does not restrict the power of the legislature as it was

exercised in enacting the malpractice damage cap." The court cited no precedent for this constitutional interpretation, nor has *Davis* been followed by another federal court.

Davis' analysis ignores the historical fact that the anti-federalists urged adoption of the Seventh Amendment not merely to protect against judicial interference with jury verdicts, but "as protection against corrupt or unwise legislation." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 705-07 (1973). In Justice Scalia's memorable summary, "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Under the Articles of Confederation, the states had given predominant governmental power to the legislative branch. They soon found themselves oppressed by the "elective Despotism" of their own legislatures. Gordon S. Wood, *The Creation of the American Republic: 1776-1787*, 451-42 (1967).

"One abuse that was prevalent during the Confederation," Justice Powell observed, "was the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring). State legislatures were "interfering in causes between parties, reversing court judgments, [and] staying executions after judgments." Wood, *supra*, at 407. The Seventh Amendment was adopted not only as a restraint on the power of life-tenured federal judges, but also as a check on legislative interference with the judicial function.

While the Supreme Court has not yet addressed this issue, cases establish that the Seventh Amendment precludes application of state

legislation constituting reexamination of a jury's verdict in a federal cause of action. In *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830), this Court faced the issue whether a federal court in a diversity case was obligated to follow a Louisiana statute mandating that testimony be preserved in writing so an appellate court may reverse the jury verdict on issues of fact. A congressional statute required federal courts to apply the mode of practice followed by state courts of the forum state. The Supreme Court held that, because the Seventh Amendment prohibits Congress from enlarging the powers of appellate courts to reexamine the jury's factfindings, the federal statute did not require application of the Louisiana statute. *Id.* at 447-49.

Similarly, in *Gasperini v. Center for Humanities*, 518 U.S. 415, 426 (1996), this Court held that federal appellate courts in diversity cases may not apply a New York remittitur statute that was "out of sync" with the federal appellate function under the Reexamination Clause. Instead, *Gasperini* concluded that a federal district court can apply the "substantive thrust" of the New York statute, but federal appellate courts may only review remittitur decisions for an abuse of discretion. *Id.* at 433-35.

Michigan's medical malpractice cap may be valid under Michigan law. Its application in this federal EMTALA action, however violates the Seventh Amendment. Plaintiff's petition should be granted and the Sixth Circuit's decision reversed.

III. M.C.L. 600.1483 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

M.C.L. 600.1483 also violates the equal protection clause of the U.S. Constitution. U.S. Const., amend. XIV, § 1. The damage cap does not withstand intermediate scrutiny or a rational basis test. The Sixth Circuit decision failed to address the decisions of many state supreme courts holding that damage caps violate equal protection. S.Ct. R. 10(a). Once again, this Court should address this important question of federal law. S.Ct. R. 10(c).

Section 1 of the Fourteenth Amendment protects against class-based discrimination by requiring varying levels of governmental justification for classification among people. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). National cases are divided whether caps on non-economic damages are constitutional. *Ferdon ex. rel. Petrucelli v. Wisc. Patients Compensation Fund*, 701 N.W.2d 440, 448 n.12 (Wis. 2005) (cases cited therein). By far, the better reasoned decisions conclude that medical malpractice damage caps violate equal protection.

Several courts have held that injured victims have a state constitutional right to full recovery in a tort action. *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984); *Smith v. Dept. of Ins.*, 507 So.2d 1080, 1088 (Fla. 1987); *Pfost v. State*, 713 P.2d 495, 503 (Mont. 1985). In *Kenyon*, the Arizona Supreme Court subjected legislation limiting the statute of limitations in medical malpractice cases to strict scrutiny.

Other courts hold that categorical damage caps (like M.C.L. 600.1483) create disparate classes

and interfere with "an important substantive right" to recover for personal injuries. *See Carson v. Mauer*, 424 A.2d 825, 830 (N.H. 1980); *Richardson v. Carnegie Library Rest., Inc.*, 763 P.2d 1153, 1163-65 (N.M. 1988) (limitation of a full tort recovery "implicates a substantial and important individual interest"). As such, analyzing the constitutionality of damage caps under mid-level or intermediate equal protection scrutiny, these cases found that caps violate equal protection because they do not closely further "a substantial interest of the State." *Id.* at 1163, (citation omitted); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 353-56 (Utah 1989) (see other cases cited).

Based on this authority, at a minimum, M.C.L. 600.1483 must be evaluated under intermediate scrutiny. The statute does not pass constitutional muster. As the court concluded in *Moore v. Mobile Infirnary Assoc.*, 592 So.2d at 167, no one has ever articulated a substantial governmental interest for damage caps. Several regional and national governmental studies confirm that there is no tangible evidence caps improve the quality, availability or cost of health care. *Ferdon ex. rel. Petrucelli v. Wisc. Patients Compensation Fund*, 701 N.W.2d 440, 470-89 (Wis. 2005).

Overlooking the cases holding that caps must withstand heightened equal protection scrutiny, citing *Boyd*, 877 F.3d at 1196, the Sixth Circuit concluded that this issue is "subject only to limited 'rational basis' review." App. 13a. The Sixth Circuit then accepted, as gospel, the two-judge majority's conclusion in *Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich. App. 2002), that M.C.L. 600.1483 does not violate Michigan's constitution because serves the legitimate governmental purpose of controlling

"increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs." App. 14a. The Sixth Circuit failed to independently analyze whether M.C.L. 600.1483 is actually rationally related to a legitimate governmental purpose and is not arbitrary. It also failed to note, let alone persuasively rebut, Judge Fitzgerald's strong dissent in *Zdrojewski*, 657 N.W.2d at 739 and the subsequent Michigan Court of Appeals decision in *Wiley v. Henry Ford Cottage Hosp.*, 688 N.W.2d 402, 416 (Mich. App. 2003). *Wiley* held that, while it was obligated to follow *Zdrojewski* as a prior published decision, the majority decision upholding the constitutionality of M.C.L. 600.1483 was incorrect and should be overruled. *Id.*

The Sixth Circuit also failed to address the Wisconsin Supreme Court's recent compelling holding that a $350,000 medical malpractice non-economic damage cap flunked the rational basis test. *Ferdon*, 701 N.W.2d 440.[2] After an exhaustive and scholarly analysis of regional and national studies, *Ferdon* held that the malpractice cap was not rationally related to any legitimate governmental objective and violated equal protection. In doing so, *Ferdon* definitively rebutted the so-called rational justifications for M.C.L. 600.1483 that the Sixth Circuit lists. *Ferdon* found that caps on non-economic damages do not contribute to lower medical malpractice insurance premiums or lower health care costs. *Id.* at 468, 483-

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[2] Smith notified the Sixth Circuit of *Ferdon* at both oral argument and in the petition for rehearing. Petition for Rehearing at 14.

85. It also found that meritless lawsuits, and not the size of verdicts, actually affect malpractice insurance rates. *Id.* at 470-74. *Ferdon* finally determined that caps do not encourage health care providers to practice in a state. *Id.* at 485-89. Echoing *Ferdon*, the North Dakota Supreme Court has also held that a medical malpractice damage cap does not survive rational basis scrutiny. *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978).

M.C.L. 600.1483 accordingly violates the equal protection clause of the U.S. Constitution under a rational basis test. There is absolutely no reasonable basis for capping medical malpractice, wrongful death damages at $359,000.00. App. 16a. In turn, there is no rational reason why the recovery of most Michigan wrongful death plaintiffs is not capped, product liability plaintiffs' damages are capped at $500,000.00, M.C.L. 600.2946a(1), and medical malpractice plaintiffs' damages are capped at $359,000.00. M.C.L. 600.1483, if applicable in this case, is unconstitutional.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

ANDREA SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF KELLY SNIDER SMITH, DECEASED,
Plaintiff/Petitioner

v.

BOTSFORD GENERAL HOSPITAL, A MICHIGAN NON-PROFIT CORPORATION
Defendant/Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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RECOMMENDED FOR FULL-TEXT PUBLICAION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0355p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANDREA SMITH, Personal Representative of the Estate of Kelly Snider Smith, deceased,

Plaintiff-Appellee,

v. *No. 04-1436*

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 00-71459-Avern Cohn, District Judge.

Argued: July 22, 2005

Decided and Filed: August 18, 2005

Before: GIBBONS and COOK, Circuit Judges;
PHILLIPS, District Judge.*

COUNSEL

ARGUED: Robert G. Kamenec, PLUNKETT & COONEY, Bloomfield Hills, Michigan, for Appellant.

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* The Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Donald M. Fulkerson, Westland, Michigan, for Appellee. **ON BRIEF:** Robert G. Kamenec, PLUNKETT & COONEY, Bloomfield Hills, Michigan, Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Appellant. Donald M. Fulkerson, Westland, Michigan, Geoffrey N. Fieger, FIEGER, FIEGER, KENNEY & JOHNSON, Southfield, Michigan, Marc E. Lipton, LIPTON LAW CENTER, Southfield, Michigan, for Appellee. Gregory W. Moore, HALL, RENDER, KILLIAN, HEATH & LYMAN, Troy, Michigan, David Arkush, Allison M. Zieve, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., Jeffrey Robert White, CENTERFOR CONSTITUTIONAL LITIGATION, Washington, D.C., for Amici Curiae.

OPINION

COOK, Circuit Judge. Plaintiff Andrea Smith, personal representative of the estate of Kelly Smith, deceased, brought an action against Defendant Botsford General Hospital, alleging that it violated the Emergency Medical Treatment and Active Labor Act ("EMTALA") when it failed to stabilize Kelly Smith's condition-caused by an open femur fracture-before transporting him. Following a trial, the jury found in favor of Plaintiff and awarded $35,000.00 for economic damages and $5,000,000.00 for non-economic damages. Botsford filed several post-trial motions seeking a new trial or a damages award reduction. The district court denied the motions, and Botsford appeals.

I

Kelly Smith, a 33-year-old man weighing approximately 600 pounds, fractured his left leg during a rollover car accident. Smith was transported to Botsford, where examining doctors diagnosed him as having an open comminuted left femur fracture--a break that causes the bone to pierce the skin. Considering its limited capacity to care for someone Smith's size, Botsford decided to transfer him to another hospital. While in the ambulance, Smith's condition began to deteriorate, and 21 minutes into the transfer, he died from extensive blood loss.

Plaintiff alleged that Botsford failed to stabilize Smith, as EMTALA requires, before transferring him. Plaintiffs witnesses testified that Smith suffered progressive blood loss and that Botsford needed to take additional measures, such as giving Smith a blood transfusion, to stabilize his condition. Botsford, by contrast, presented evidence that it had taken all appropriate steps to and did successfully stabilize Smith before transferring him, that Smith's rapid deterioration could not have been anticipated, and that Smith's weight and cocaine and alcohol use contributed to his death.

II

"The Emergency Medical Treatment and Active Labor Act. . . places obligations of screening and stabilization upon hospitals and emergency rooms that receive patients suffering from an 'emergency medical condition.'" *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 250 (1999). This case implicates EMTALA's stabilization requirements. Specifically, the Act mandates:

(1) In general

> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either-
>
> > (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
> >
> > (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

42U.S.c. §1395dd(b). To "stabilize" under the Act" means, with respect to an emergency medical condition. . . to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(A). The Supreme Court clarified that a plaintiff need not prove the existence of an improper motive to bring suit under EMTALA. *Roberts*, 525 U.S. at 250.

A. Expert Testimony

Botsford contends that the district court abused its discretion in striking defense expert Dr. Robert Aranosian's testimony. Dr. Aranosian

testified during his deposition that Smith died not from hemorrhagic shock and blood loss, but instead from cardiac arrest brought on by eight comorbidities, including his morbid obesity, history of alcoholism, smoking, and drug abuse. Dr. Aranosian's opinion regarding Smith's chronic alcoholism stemmed from conversations with Smith's deceased relative who had at one time consulted Dr. Aranosian concerning Smith's drinking problems-but neither Dr. Aranosian nor defense counsel disclosed this information until it came out during Plaintiffs cross-examination of Dr. Aranosian at trial. Upon Plaintiff's counsel's and the court's questioning, Dr. Aranosian admitted that Smith's relative "routinely would come to my office and chat with me about his concern regarding Mr. Smith's habits and what I could do to assist him," and that outside of this personal knowledge, no other record evidence supported his opinion concerning Smith's chronic alcoholism. Then, when asked, "Did you previously disclose this to anybody?" Dr. Aranosian admitted, "Not until just now."

The district court decided to address this failure-to-disclose issue by striking entirely Dr. Aranosian's testimony. As the court saw it, Dr. Aranosian had "an affirmative obligation. . . to disclose in advance of his deposition [and trial] testimony, that he had personal knowledge, even if it was second hand," and striking only the references to chronic alcoholism would not suffice to remedy the breach of this obligation. The court further found striking Dr. Aranosian's testimony "not fundamentally unfair" to Botsford's case, given that the testimony was "largely cumulative" of the testimony of another expert witness, Dr. Dragovic-a witness the defense presented before Dr. Aranosian

testified.

Botsford insists this move by the district court so prejudiced its case that it warrants reversal even under the highly deferential abuse-of-discretion standard. We, however, find no abuse of discretion with the district court's choice of sanction. Fed. R. of Civ. P.26(a)(2)(B) requires a party to disclose "the data or other information considered by [its expert] in forming [his] opinions"-which Botsford's expert clearly failed to do here, as conceded by him under questioning. And Rule 37 authorizes-indeed, directs-exclusion of the witness as a sanction for a Rule 26 violation. *See Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003). Though Rule 37 also allows the district court to impose less stringent sanctions than mandatory preclusion, the district court's choice to observe the rule's primary directive (exclusion), rather than its secondary options, did not constitute an abuse of its broad discretion. *See Ames v. VanDyne,* 100F.3d956 (Table), No. 95-3376, 1996 WL 662899, at 4 (6th Cir. Nov. 13, 1996) ("[B]ecause the district court is in the best position to determine whether a party has complied with discovery orders, its discretion is especially broad.") (citation and internal quotation marks omitted). Our conclusion is further strengthened by the district court's finding, which Botsford does not dispute, that Dr. Aranosian's testimony was cumulative of that provided by Dr. Dragovic.

B. Application of Michigan's cap on noneconomic damages

Botsford also raises several challenges to the damages award. We first address Botsford's contention that the noneconomic damages should be

reduced in accordance with the Michigan malpractice cap-an issue of first impression in this circuit. The cap, found in Mich. Comp. Laws §600.1483, limits noneconomic damages" in an action for damages alleging medical malpractice" to $359,000.00.[1] Plaintiff, of course, vehemently objects to the application of the state cap.

As a threshold matter, we consider Plaintiff's argument that EMTALA does not incorporate state law damages caps under any circumstances. Our analysis in this regard begins and ends with the plain language of the statute. EMTALA's civil enforcement provisions specify that "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of [the Act] may, in a civil action against the participating hospital, obtain those damages available for personal injury *under the law of the State in which the hospital is located.* ..." 42 U.S.C. § 1395dd(d)(2)(A) (emphasis added). In Plaintiffs view, this language only requires courts to consider the *types* of damages recoverable under state law, not the amount. In support, Plaintiff contrasts EMTALA to the Federal Tort Claims Act, which specifies that plaintiffs can recover damages "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, Plaintiff reasons, had Congress intended to incorporate state damages caps, it would have included language similar to that found in the FTCA. We find this argument unpersuasive. "While we agree that the

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[1] The statute actually caps damages at $280,000.00 but this number changes as a result of yearly adjustments. The 2003 adjustment applicable here capped damages at $359,000.00.

language in § 1395dd(d)(2)(A) applies to elements of damages, we see nothing in the language of the section indicating that 'damages available' does not also mean the amount of damages for which recovery is permitted under state law." *Power v. Arlington Hosp. Assoc.*, 42 F.3d 851, 862 (4th Cir. 1994). We thus join the majority of courts addressing the issue in finding that EMTALA's incorporation of state law extends to caps on damages. See *Valencia v. St. Francis Hosp. & Health Ctr.*, 03-cv-0252-LJM-WTL, 2004 U.S. Dist. Lexis 7929, at *7 (S.D. fud. Mar. **1,2004)** (agreeing with *Power* and listing cases); *Barris v. County of Los Angeles*, 972 P.2d 966,973 (Cal. 1999)(same). *But see Cooper v. Gulf Breeze Hosp., Inc.*, 839 F.Supp. 1538, 1542-43 (N.D. Fla. 1993) (discussing the differences between medical malpractice and EMTALA and declining to apply state procedural requirements applicable to malpractice claims).

Whether EMTALA's incorporation of state law leads to the application of Michigan's malpractice damages cap is the next question. Though we find no decision addressing the applicability of Michigan's malpractice damages cap to an EMTALA failure-to-stabilize claim, we take guidance from the Fourth Circuit's decision in *Power*, which instructed: "the appropriate starting point for analyzing whether [a state] malpractice cap applies and what damages are available. . . is [this] threshold question. . . : Whether [the plaintiffs] EMTALA claim would be deemed a malpractice claim under [state law]?" *Power*, 42 F.3d at 860.

Agreeing with *Power* that this approach "best effectuates Congress's direction that courts should look to state law to determine what damages are

available in an EMTALA action," *id.* at 864, we follow it here to determine the applicability of Michigan's malpractice damages cap. We thus focus our inquiry on whether Plaintiffs failure-to-stabilize claim would constitute a medical malpractice claim under Michigan law.

The Michigan Supreme Court recently articulated the test for determining "whether the nature of a claim is ordinary negligence or medical malpractice" in *Bryant v. Oakpointe Villa Nursing Ctr.*, 684 N.W.2d 864, 869 (Mich. 2004). *Bryant* instructs that courts undertaking this analysis should first ask "whether [the claim] is being brought against someone who, or an entity that, is capable of malpractice." *Id.* at 870. Then, according to *Bryant,* courts should consider whether "the alleged claim sounds in medical malpractice"-which, in turn, depends on the resolution of two additional questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Id.* at 870-71. "If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id.* at 871.

With respect to the second of the two questions, *Bryant* identified the need for expert testimony as the key distinguishing feature of claims involving medical judgment:

> If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and

> experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved.

Id. at 872.

Plaintiff does not dispute that Botsford is an entity capable of malpractice or that the claim "pertains to an action that occurred within the course of a professional relationship." Instead she premises her objection to the classification of her claim as a malpractice action on the ground that it does not raise questions of "medical judgment." This is so, Plaintiff reasons, because the EMTALA claim requires no breach of the professional standard of care-the hallmark of traditional malpractice claims. But, while *Bryant* acknowledged that the traditional definition of malpractice *"contribut[es]* to an understanding of what constitutes a 'medical judgment, ", *id.* (emphasis added), it did not limit "medical judgment" to claims arising from a breach of the professional standard of care. To the contrary, as we see it, *Bryant's* own application of the standards it outlined reflects a much broader interpretation of malpractice, with the defining element being the need for experts. *See id.* at 873-74 (deeming claim that the defendant failed to train its staff to recognize that beds posed risk of asphyxiamal practice because "the ability to assess the risk of positional asphyxia and, thus, the training of employees to properly assess that risk, involves the exercise of professional judgment," "[g]iven the

patent need. . . for expert testimony"); *id.* at 875 (finding allegation that the defendant failed to inspect beds to eliminate risk of positional asphyxia "beyond the ken of common knowledge," and thus sounding in medical malpractice, because "[t]he risk assessment at issue. . . require[d] understanding and consideration of the risks and benefits of using and maintaining a particular set of restraints in light of a patient's medical history and treatment goals.").

Reading *Bryant* in this manner, we have no difficulty concluding that this EMTALA failure-to-stabilize claim would constitute a malpractice action under Michigan law. Like the claims *Bryant* deemed malpractice actions, compliance with EMTALA's stabilization requirements entails medical judgment (assuring *"within reasonable medical probability,* that no material deterioration of the condition is likely," 42 D.S.C. § 1395dd(e)(3)(A) (emphasis added))-understood, as this case exemplifies-only through expert testimony. We thus conclude Michigan's cap on malpractice damages limits Plaintiffs non-economic damages to $359,000.00.

C. Constitutionality of Mich. Comp. Laws. § 600.1483

Our conclusion that Michigan's malpractice damages cap applies necessitates addressing Plaintiff's alternative challenge to the constitutionality of the cap. Specifically, Plaintiff insists that Mich. Comp. Laws § 600.1483 violates the Seventh Amendment and the Equal Protection Clause. Drawing on the reasoning of courts upholding caps on damages, we find neither argument availing.

1. Seventh Amendment

In *Boyd* v. *Bulala,* 877 F.2d 1191 (4thCir. 1989), the Fourth Circuit held that Virginia's cap on medical malpractice damages did not violate the Seventh Amendment. In its view, the jury's role "as fact finder [is] to determine the extent of a plaintiffs injuries," not "to determine the legal consequences of its factual findings." *Id.* at 1196. Additionally, the court reasoned: "If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well." *Id. See also Phillips* v. *Mirac, Inc.,* 685 N.W.2d 174, 180 (Mich.2004) (echoing the reasoning in *Boyd* and finding a cap on damages lawful under the Michigan constitution's analogous jury right).

We find this reasoning persuasive and conclude that Mich. Compo Laws § 600.1483-implicating no protected jury rights-does not offend the Seventh Amendment.

2. Equal Protection

Plaintiff's equal-protection challenge fares no better. Though Plaintiff urges us to apply heightened scrutiny, she supplies no basis for doing so. As the Fourth Circuit noted in *Boyd,* "a limitation on a common law measure of recovery does not violate a fundamental right or create a suspect classification." 877 F.2d at 1196. Instead, it "is 'a classic example of an economic regulation' . . . subject only to limited 'rational basis' review." *Id.* at 1196-97 (internal citations omitted). "Under a rational basis review, a statute is valid if it rationally furthers a legitimate governmental interest." *LensCrafters, Inc. v. Robinson,* 403 F.3d 798, 806 (6th Cir. 2005). We

accord the statute "a strong presumption of validity," and uphold it "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (citations and internal quotation marks omitted).

In *Zdrojewski v. Murphy*, a Michigan appellate court addressing an equal-protection challenge to Mich. Comp. Laws §600.1483 concluded that the statute satisfies the rational basis test. 657 N.W.2d 721, 739 (Mich. Ct. App. 2002). The court opined:

> The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. Controlling health care costs is a legitimate governmental purpose. By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose.

Id. (internal citations omitted). This decision's sound reasoning moves us to conclude as it did that Mich. Comp. Laws § 600.1483 survives rational-basis scrutiny. Plaintiff's equal-protection argument thus fails.

D. Reduction of future damages to present value

Botsford also insists that the district court's failure to ensure the reduction of future damages to present value-by refusing to give the jury a verdict form distinguishing between past and future damages or, in the alternative, to instruct the jury to

reduce future damages to present value-violates Michigan law, Mich. Comp. Laws §§ 600.6304-6306, and entitles it to a new trial on damages. First, we agree with Plaintiff that Botsford forfeited its argument regarding the verdict form by failing to properly object. Though Botsford generally objected to the court's non-use of the verdict form, it did not, as Plaintiff points out, premise that argument on the need to reduce future damages to present value. Nor did Botsford object to the form ultimately chosen on the ground that it did not differentiate past and future damages. Thus, Botsford failed to put the district court on notice of a potential issue regarding future damages and present-value calculation.

Botsford did preserve its challenge to the district court's failure to instruct the jury to reduce future damages to present value, but this claim lacks merit. We review a court's refusal to give a requested instruction for abuse of discretion. *Fisher v. Ford Motor Co.*, 224 F.3d 570,576 (6th Cir. 2000). As Botsford contends, Michigan law requires reduction of future damages to present value. *See* Mich. Comp. Laws § 600.6306. But the Michigan Supreme Court has also instructed that juries should consider inflation when ascertaining future damages, even if the plaintiff presents no evidence on the issue. *Kovacs v. Chesapeake and Ohio Ry. Co.*, 397 N.W.2d 169, 170 (Mich. 1986); *Haas v. Briggs*, No. 224753, 2002 Mich. App. Lexis 1269, at *4 (Mich. Ct. App. Sept. 3, 2002). Botsford's requested instruction would have directed the jury to reduce future damages to present value without providing a corresponding inflation instruction. The district court denied the request because of this deficiency, and we find no abuse of discretion in this decision. In any event, the absence of an inflation instruction renders any claim

that Botsford suffered harm as a result of the instruction purely speculative. *Great Am. Ins. Cosov. Garan, Lucow, Miller, Seward, Cooper & Becker, PC, et al.*, No. 203014, 1998 WL 1989994, at *2 (Mich. Ct. App. Sept. 4, 1998). It is entirely plausible that the jury's upward adjustment *for* inflation would have equaled, or even exceeded the reduction for present value. *Kirchgessner* v. *United States,* 958 F.2d 158, 162 (6th Cir.1992); *Howard* v. *Chesapeake & Ohio Ry. Co.*, 812 F.2d 282,287 (6th Cir. 1987).

E. Remittitur

Pressing the purportedly excessive nature of the noneconomic damages awarded in this case, Botsford seeks remittitur or a new trial on damages. We need not address this argument in light of our holding that Mich. Comp. Laws § 600.1483 requires that the award be reduced to $359,000.00.

F. Request *for* a new judge on remand

Finally, Botsford requests that this court order the assignment of a new district judge to handle all future proceedings. Our decision requires remand *for* the limited purpose of applying Michigan's cap on damages. Botsford fails to present any evidence warranting reassignment for this task.

III

Because we find the district court should have applied Mich. Comp. Laws §600.1483 to limit the noneconomic damages in this case, we reverse the district court's holding on this point and remand *for* reduction of noneconomic damages to $359,000.00 in accordance with Michigan law. In all other respects, we affirm.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1436

ANDREA SMITH, Personal Representative of the Estate of Kelly Snider Smith, deceased, Plaintiff - Appellee,

v.

BOTSFORD GENERAL HOSPITAL, Defendant-Appellant.

Before: GIBBONS and COOK, Circuit Judges; PHILLIPS, District Judge.

Filed Aug 18, 2005

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and the case is REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/_____
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIE SMITH,
Personal Representative of the
Estate of Kelly Snider Smith, Deceased,

Plaintiff, No. 00-7149

v. Hon. Avern Cohn

BOTSFORD GENERAL HOSPITAL,
a Michigan Non-Profit Corporation,

Defendant.

_____/

FILED May 28, 2002

MEMORANDUM AND ORDER

I. Introduction

This is an action under the Emergency Medical Treatment and Active labor Act (EMTALA), 42 U.S.C. § 1395dd(b). Plaintiff, Willie Smith, the executor of the estate of Kelly Snider Smith (Smith), claims that Defendant Botsford General Hospital (Botsford) transferred Smith to the University of Michigan Medical Center (Medical Center) before stabilizing his emergency medical condition in violation of EMTALA.

Before the Court is Plaintiff's motion to strike Botsford's affirmative defenses of: 1) Contributory/Comparative Negligence, and 2)

impairment due to influence of alcohol or drugs under M.C.L.A.600.2955a. For the following reasons, Plaintiff's motions will be granted. Also before the Court is Plaintiffs motion to strike Botsford's affirmative defense of the Michigan Medical Malpractice Damages Cap, M.C.L.A. 600.1483. The Court reserves decision on this motion.

II. Discussion

A. Contributory/Comparative Negligence

In its affirmative defenses, Botsford claims that "[t]he injuries and damage complained of in Plaintiff's complaint may have been a direct and proximate result of the negligence and/or contributory negligence and/or comparative negligence of Plaintiff." Specifically, Botsford argues that Smith's negligence contributed to his injuries and fault should be apportioned between Smith and Botsford. Botsford says the following acts should be considered by the jury when apportioning fault: 1) Smith's speeding prior to the automobile accident; 2) Smith's failure to wear a seatbelt; 3) Smith's failure to tell Botsford that he had used cocaine; 4) Smith's misrepresentation of the amount of alcohol he consumed prior to the automobile accident; 5) Smith's inability to lie still in his hospital bed despite being instructed to do so.

Plaintiff argues that because a violation of EMTALA is not an action based on malpractice, the jury should not consider whether Smith contributed to his injuries nor apportion fault between Smith and Botsford. Further, Plaintiff argues that any evidence pertaining to Smith's actions should be deemed inadmissible as irrelevant and prejudicial. To support this argument, Plaintiff cites Griffith v. Mt. Carmel Medical Center, 842 F. Supp. 1359 (D. Kan.

1994). In Griffith, the district court reasoned that because "[a] hospital's liability under EMTALA is not grounded upon tort concepts" but is rather "predicated on the hospital's violation of [a] *federal* statute," state comparative fault principles were inapplicable. Id. at 1365. The Griffith court explained that such an interpretation is consistent with the purpose of EMTALA -to prevent "patient dumping[2]." To interpret a violation of EMTALA as a malpractice action, the Griffith court explained, runs contrary to the purpose of EMTALA. Id. at 1365 n. 4 ("One may reasonably ask: How can a hospital negligently refuse to treat someone because he or she has no insurance?").

Botsford argues that Griffith was erroneously decided because the district court incorrectly held that hospitals were "strictly liable" for a violation of EMTALA. Botsford argues that the Court should apply the reasoning adopted by the California Supreme Court in Barris v. County of Los Angeles, 20 Cal. 4th101 (1999). In Barris, the court reasoned that EMTALA is not a strict liability statue because it "requires hospitals. . . to adhere to a certain level of professional care in treating patients who have been determined to have an emergency medical condition." *Id.* at 115.

The reasoning in Griffith is persuasive. Clearly from a plain reading of EMTALA liability is predicated on a finding that the hospital failed to

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[2] "Patient dumping" is the refusal to treat individuals or the inappropriate transfer of patients for an improper reason. A plaintiff, however, need not prove an improper motive to establish a claim for failure to stabilize. Roberts v. Galen of Virginia, 525 U.S. 249 (1999).

screen or stabilize a patient within its capabilities.[3] Unlike a malpractice action, liability is not predicated on a finding that the hospital breached a professional standard of care. Accordingly, contrary to the holding in Barris, a violation of EMTALA is not an action for medical malpractice. Thornton v. Southwest Detroit Hospital, 895 F.2d 1131, 1133 (6thCir. 1990) (holding that "[a] cause of action under [EMTALA] is not analogous to a state medical malpractice claim. . ."); Brooks v. Maryland General Hospital Inc., 996 F.2d 708, 713 (4thCir. 1993) ("EMTALA does not create a standard of care to be followed, but rather accepts for purposes of the Act that standard, within the hospital's capabilities, that is applied generally by the hospital. Stated otherwise, EMTALA does not create liability for malpractice. . . at the core, it aims at disparate treatment.").

Accordingly, because EMTALA is not an action in tort, the principles of contributory negligence and comparative fault are inapplicable. While Plaintiff asks that all evidence pertaining to Smith's acts that may be construed as evidence of contributory negligence be deemed inadmissible,

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[3] Under EMTALA, "the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department. . . to determine whether or not an emergency medical condition. . . exists." 42 U.S.C. § 1395dd (a) (emphasis added). Further, "the hospital must provide. . . within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition" prior to transfer of the individual. Id. at § 1395dd(b)(1) (emphasis added).

plainly evidence of Smith's acts and condition may be relevant to establish his known emergency medical condition and whether Botsford personnel stabilized him prior to his transfer.

B. Impairment due to influence of alcohol or drugs under M.C.L.A. 600.2955a

In its affirmative defenses, Botsford claims that "Plaintiffs claims for damages may be barred by M.C.L.A. 600.2955(a) due to Plaintiffs impaired ability to function due to the influence of intoxicating liquors and/or controlled substance." Under M.C.L.A. 600.2955(a),

> It is an absolute defense in an action for the death of an individual. . . that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury.

An "impaired ability to function" is defined as,

> as a result of individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence

> of intoxicating liquor or controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code. . . . a presumption would arise that the individual's ability to operate a vehicle was impaired.

Plaintiff concedes that Smith's blood alcohol level was between .0935 and .0968 and that Smith had used cocaine. Under Michigan's Motor Vehicle Code,[4] Smith would be presumed to have an impaired ability to operate a vehicle with this blood alcohol level, therefore, Smith is presumed to have an impaired ability to function under M.C.L.A. 600.2955a. Further, Botsford's expert opines that Smith's use of alcohol and cocaine were contributing factors in his death. Accordingly, Botsford argues that the jury should decide whether Smith's claim is barred under M.C.L.A. 600.2955a.

As stated above, however, EMTALA is not an action in medical malpractice or tort. The defense established in M.C.L.A. 600.2955a is based on principles of comparative and contributory fault. Botsford, however, argues that M.C.L.A. 600.2955a abrogated comparative fault. Botsford cites Wysocki v. Kivi, 2001 WL 1474984 (Mich.. App. 2001) (unpublished) as support for its argument. The Michigan Court of Appeals in Wysocki, however, addressed whether a plaintiff was deprived of due process rights because M.C.L.A. 600.2955a did not

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[4] UnderM.C.L.A.257.625a,if there was at the time in excess of .07% but less than 0.10% by weight of alcohol in the defendant's blood, it is presumed that the defendant's ability to operate a vehicle was impaired. . . .

employ the "reasonable person" standard utilized under the common law doctrine of comparative fault when deciding whether to bar plaintiff's action under M.C.L.A.600.2955a. The Wysocki court held that the plaintiff's due process rights were not violated even though M.C.L.A. 600.2955a utilized a presumption to determine the plaintiff's fault rather than a "reasonable person" standard because 600.2955a abrogated the common law doctrine of comparative fault.

It is clear, however, that the defense under M.C.L.A. 600.2955a is based on the principles of comparative fault because the fault of the plaintiff is considered. Accordingly, because 600.2955a is based on an assessment of the plaintiff's comparative fault, it is not applicable to an EMTALA action for the reasons stated in the previous section. Again, Plaintiff asks that Smith's alcohol and cocaine use be deemed inadmissible. While Botsford's affirmative defense that Smith's action is barred under M.C.L.A. 600.2955a should be stricken, evidence of Smith's use of alcohol and cocaine' may be relevant to establish the known emergency medical condition and whether Botsford personnel stabilized Smith prior to his transfer,

C. The Michigan Medical Malpractice Damages Cap[5]

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[5] This issue need not be addressed at this time. It is not ripe for decision until:1) Botsford is found liable under EMTALA for failing to stabilize Smith prior to his transfer; and 2) the jury awards Smith more than the cap under M.C.L.A. 600.1483. However, an indication of the Court's inclination regarding of the applicability of the cap may assist in resolving this case.

In its affirmative defenses, Botsford alleges that "Plaintiff's claims for recovery of economic and non-economic losses may be barred by the application of State law damages caps." Under EMTALA,

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of [EMTALA], in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

Botsford argues that Plaintiffs damages are limited under the Michigan Medical Malpractice cap which states:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting form the negligence of all defendants, shall not exceed $280,000.00 ....

M.C.L.A. 600.1483.

In Power v. Arlington Hospital Assoc., the Court of Appeals for the Fourth Circuit addressed whether the Virginia medical malpractice cap applied in an EMTALA action. 42 F.3d 851 (4th Cir. 1994). The Power court held that "courts must look at the underlying conduct challenged in the EMTALA claim and the legal basis for the challenge to determine whether such a claim, if brought under state law, would be encompassed within the state's personal injury damage limitation, the medical

malpractice damages cap, both, or neither." Id. at 863 (emphasis added). The Virginia medical malpractice cap at issue in Power stated,

> [i]n any verdict returned against a health care provided in an action for malpractice. . . which is tried by a jury. . . the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars. Id. at 861

Further, under the Virginia statute, malpractice was defined as "any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf or a patient during the patient's medical diagnosis, care, treatment or confinement." Id. at 861.

The Power court held that an EMTALA action is not an action in tort because liability was not predicated on a finding that the hospital violated a professional standard of care. However, because the Virginia medical malpractice cap was interpreted broadly by state courts to encompass actions such as intentional torts which are not based on a breach of a professional standard of care, the Power court held that it applied to EMT ALA violations.

The cap created in M.C.L.A. 600.1483 applies only to actions "alleging medical malpractice." Michigan courts have defined medical malpractice as "the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality." Becker v. Meyer Rexall Drug Co., 141 Mich. App.

481, 485 (Mich. App. 1985). Botsford argues, however, that a claim is for medical malpractice if the alleged injury occurs within a professional relationship. Accordingly, Botsford argues, because the injury to Smith occurred during the course of the professional relationship with Botsford, the EMTALA violation can be characterized under Michigan law as a claim for medical malpractice. To support its argument, Botsford cites Danner v. Holy Cross Hospital, 189 Mich. App. 397 (Mich. App. 1991) and Bronson v. Sisters of Mercy Health Corp., 175 Mich. App. 647 (Mich. App. 1989). In Danner and Bronson, the plaintiffs attempted to characterize their claims as ordinary negligence. The injury in both Danner and Bronson arose out of the hospitals' failure to supervise or review medical staff. The Bronson court reasoned that the hospital failed to "comply with the standard of care and skill of hospitals in similar localities" by failing to review the conduct of its medical staff. 175 Mich. App. 647 (Mich. App. 1989) (citing Nemin v. Sinai Hospital, 143 Mich. App. 697 (Mich. App. 1985)). Likewise, the Danner court relied on the reasoning in Bronson and held similarly that "the providing of professional medical care and treatment by a hospital includes supervision of" medical staff. 189 Mich. App. 397, 399 (Mich. App.1991) (quoting Bronson *supra).* Accordingly, a claim for medical malpractice requires a showing that a professional standard of care was breached.

Unlike the statute in Power, the definition of medical malpractice in Michigan requires a plaintiff to show that a professional standard of care was breached. As stated above a plaintiff is not required to show a violation of a professional standard of care to establish an EMTALA violation.

III. Conclusion

Accordingly, Plaintiff's motion is GRANTED and Botsford's affirmative defenses of: 1) Contributory/Comparative Negligence; 2) impairment due to influence of alcohol or drugs under M.C.L.A.600.2955a are STRICKEN. The Court reserves decision on Plaintiff's motion to strike Botsford's affirmative defense of the Michigan Medical Malpractice Damages Cap, M.C.L.A. 600.1483.[6]

SO ORDERED.

s/
AVERN COHN
UNITED STATES DISTRICT JUDGE

Date: MAY 28 2002

Detroit, Michigan

[6] As the Court observed at oral argument, Botsford appears to be taking a tendentious approach to the issues in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDREASMITH, Personal Representative, of the Estate of KELLY SNIDER SMITH, deceased,

Plaintiff,

v. No. 00-71459
HONORABLE AVERN COHN

BOTSFORD GENERAL HOSPITAL,
A Michigan non-profit corporation,

Defendant.
_____/

FILED Feb 09, 2004

DECISION AND ORDER ON DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

I. Introduction

This is a case under the Emergency Medical Transfer Liability Act (EMTALA), 42 U.S.C. § 1395dd, that was tried to a jury under Michigan's wrongful death act, M.C.L. § 600.2922, who awarded damages in favor of plaintiff.

Before the Court is defendant, Botsford General Hospital's (Botsford) motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). For the reasons that follow, the motion will be denied.[1]

[1] This is a revision and extension of the Court's bench

II. Botsford's Arguments

Botsford requests that the Court amend the judgment in three respects, two of which are predicated on the EMTALA limitation that the damages to which the plaintiff is entitled are those "available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A). Botsford says that this limitation – requires the Court to apply the cap on noneconomic damages in a medical malpractice action found in Michigan law under M.C.L. § 600.1483, and also requires the Court to reduce future damages to present value, as required by Michigan law under M.C.L.§ 600.6306.

Botsford further says that there is a third limitation in Michigan law, under M.C.L. § 600.6013,which eliminates all prejudgment interest on future damages, which must also be applied to this case. However, because the Court declines to award prejudgment interest, this limitation is moot and will not be considered.

III. Analysis

A. Application of Medical Malpractice Cap on Noneconomic Damages

1.

Plaintiff, Andrea Smith (Smith), as Personal Representative of the Estate of Kelly Snider Smith, deceased, argues against the cap for three reasons:

First, she says the cap does not apply to an EMTALA action. This argument will be dealt with below.

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opinion of January 23, 2004.

Second, Smith says that the cap does not apply in a wrongful death action. Current Michigan law says that this position is correct. See Jenkins v. Patel, 256 Mich. App. 112 (2003). Patel, however, is on review by the Michigan Supreme Court, 671 N.W.2d 538 (Mich. Nov. 21,2003). See also Shinholster v. Annapolis Hospital, 255 Mich. App. 339 (2003), leave to appeal granted, 671 N.W.2d 539 (Mich. Nov. 21,2003). Undoubtedly, the issue will be resolved before this case is finally concluded. No useful purpose will be served by the Court dealing with it now.

Third, Smith says the cap is unconstitutional. Current Michigan law says that it is constitutional. See Zdroiewski v. Murphy, 254 Mich. App. 50 (2003). The constitutionality of the cap, however, is currently before the Michigan Supreme Court in Phillips v. Mimc, Inc., 251 Mich.App.586, leave to appeal granted in part, 664 N.W.2d 223 (Mich. July 3, 2003). Again, the issue will be resolved before the case is finally concluded, and again, no useful purpose would be served by the Court dealing with it now. See also Green v. Knazik, No. 233482, 2003 WL 21771268 (Mich. App. July 31, 2003), application for leave to appeal held in abeyance, __N.W.2d __ (Mich. Dec. 30, 2003).

2.

The Michigan medical malpractice cap statute reads in part as follows:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants,

shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.
(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

> (5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

M.C.L. § 600.1483 (internal footnotes omitted).

Limitations on personal injury damages are also found in Michigan law regarding products liability claims and regarding rental cars. M.C.L. § 600.2946a reads as follows:

> (1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00...
>
> . . . .
>
> (3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross

> negligence, or if the court finds that the matters stated in section 2949a are true.

(internal footnote omitted).

M.C.L. § 257.401 reads in part:

> ...Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability under this subsection is limited to $20,000.00 because of bodily injury to or death of 1 person in any 1 accident and $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

Notably, Michigan does not have an overall limitation on non-economic damages for personal injury as is found in Alaska, for example. See Alaska Stat. § 09.17.010(1986) (noneconomic damages for personal injury may not exceed $500,000.00).[2]

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[2] Other states have similar caps for personal injury actions. See Colorado, 1991 Colo. Rev. Stat. § 13-21-102.5 (noneconomic damages for "any civil action" shall not exceed $500,000.00); Idaho, Idaho Code § 6-1603 (1991) (noneconomic damages for personal injury shall not exceed $400,000.00); Kansas, Kan. Stat. Ann. § 60-19a01. (b) (1990) (total amount of damages in any personal injury action shall not exceed the sum total of $250,000.00); Maryland, Md. Code Ann., Court and Judicial Proceedings Act. § 11-108 (1989 Repl. Vol.) (noneconomic damages in personal injury action limited to $350,000.00); New Mexico, N.M. Stat. Ann. § 41-5-6 (1978) (limitation of $500,000.00 per occurrence in any action); Oregon, Or. Rev. Stat. § 18.560(1) (1989) (damages arising out of bodily injury may not exceed $500,000.00); and Wyoming, Wyo. Stat. § 1-4-101 (1977) (damages for personal injury

3.

The Court in the Memorandum and Order of May 28, 2002 discussed the applicability of the cap to an EMTALA award and indicated that the cap limitation was not applicable. That discussion is incorporated here. What follows is an elaboration of the Court's reasoning for finding that the cap does not apply.

4.

The Court recognizes that decisions go both ways, with decisions favoring the cap predominating. See Power v. Arlington Hospital Ass'n, 42 F.3d 851 (4th Cir. 1994); Godwin v. Memorial Medical Center, 25 P.3d 273 (N.M. 2001), cert. granted, 26 P.3d 103, and cert. quashed, 46 P.3d 100 (2002); Feighery v. York Hospital, 38 F.Supp. 2d 142 (D. Me. 1999); Barris v. County of Los Angeles, 972 P.2d 966 (Cal. 1999);[3] Reid v. Indianapolis Osteopathic Medical

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limited to that recoverable under the wrongful death act). For a listing of various states' limits on non-economic damages, see the American Tort Reform Association's website at www.atra.org/show/7340.

[3] Interestingly, in discussing Barris, one commentator has noted the California Supreme Court "expressly did not extend its holding to view [California's medical malpractice cap]as limiting all noneconomic damages against hospitals form EMTALA violations." He goes on to say that "if an EMTALA claim did not involve professional negligence, it would not be subject to the [cap] almost all courts have fund that a failure to provide an appropriate MSE is not a negligence claim... it is a statutory disparate treatment claim, and in all likelihood would not be subject to any state malpractice cap. If tort reform is to include all EMTALA claims, state legislatures will need to draft their implementing statutes more

Hospital. Inc., 709 F. Supp. 853 (S.D. Ind. 1989).

However, the decisions to the contrary have the better of the case. See Jackson v. East Bay Hospital, 980 F.Supp. 1341 (N.D. Cal. 1997); Cooper v. Gulf Breeze Hospital. Inc., 839 F.Supp. 1538 (N.D. Fla. 1993); Power v. Arlington Hospital, 800 F.Supp. 1384 (E.D. Va. 1992). As stated in the dissent in Powers, 42 F.3d at 869:

> Although I am in substantial agreement with much of the majority opinion, I am unable to accept the majority's conclusion that Virginia's medical malpractice damages cap and limits on liability for tax-exempt hospitals are applicable to EMTALA claims. Accordingly, I respectfully dissent from subsections one and two of Part II(B) of the majority opinion and would affirm the decision of the district court in its entirety.
>
> Virtually every decision addressing EMTALA has recognized that Congress did not intend for the act to be a substitute for state medical malpractice action. In Baber v. Hospital Corp. of America. 977 F.2d 872, 880 (4thCir. 1992), we expressly declared: "EMTALA is no substitute for state law medical malpractice actions." Later we asserted that "[t]he Act (EMTALA) was not designed to provide a federal remedy or for

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carefully." Robert A. Bitterman, Providing Emergency Care Under Federal Law: EMTALA 192 (American College of Emergency Physicians).

misdiagnosis or general malpractice." Brooks v. Maryland Gen. Hosp., Inc., 996 F.2d 708, 710 (4thCir. 1993).

Furthermore, the language of the statute itself provides that an individual who establishes a violation of EMTALA and direct harm flowing there from may "obtain *those damages available for personal injury* under the law of the law of the State in which the hospital is located, and such equitable relief as is appropriate." 42 U.S.C. § 1395dd(d)(2)(A) (emphasis added). There is simply no evidence of a Congressional intent to limit damages under medical malpractice caps. The statute refers only to "damages available for personal injury." We should not rewrite the statute to limit recovery for "damages available for personal injury and malpractice claims," as was done by one district court in Reid v. Indianapolis Osteopathic Medical Hosp., 709 F. Supp. 853 (S.D. Ind. 1989). See Power v. Arlington Hospital, 800 F. Supp. 1384, 1390 (E.D. Va. 1992).

(Emphasis in original).

5.

The reasoning in Jackson and the dissent in Powers, supra, is persuasive and need not be repeated. This view of the law is reinforced by the following:

1. There is a sharp distinction between a medical malpractice claim and a claim under EMTALA. The former is based on fault; where the later imposes strict liability, Cooper v. Gulf Breeze Hospital, supra.

2. EMTALA states only that an individual may "obtain those damages available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A). Personal injury actions vary.[4] See Michigan Law of Damages and Other Remedies, 3d Ed. § 2.1 (stating that "bodily injuries can occur in products liability cases, auto negligence cases, medical malpractice cases, premises liability cases, intentional tort cases, and other types of cases.") Applying the medical malpractice cap would read into the statute a narrow construction of what constitutes "personal injury" which is not called out for in the text.

3. The legislative history of EMTALA is silent on the point. See Reid v. Indianapolis Hospital, supra.

4. EMTALA does not create a standard of care as is required in a malpractice action. See Brooks v. Maryland General

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[4] Moreover, what constitutes a medical malpractice action is far from clear. The Michigan Supreme Court is currently considering the question. See Bryant v. Oakpointe Villa Nursing Centre. Inc., 2002 WL 1040668 (Mich. App. May 21,2002), leave to appeal granted, 664 N.W.2d 221 (Mich. July 3, 2003).

Hospital. Inc., 996 F.2d 708,710 (4thCir. 1993).

5. The procedural requirements for a malpractice action are not applicable to an EMTALA action. Cooper v. Gulf Breeze Hospital, supra.

6. There are significant differences in the findings required by a jury to succeed in a malpractice action than in an EMTALA action. See Michigan Civil Jury Instruction 30.01, et seq., and O'Malley, Gremig & Lee Federal Jury Practice and Instructions, 5ed. § 36.20.

7. The considerable differences in the incorporation language in the Federal Tort Claim Act, 28 U.S.C. § 2674, which reads:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

and the language of EMTALA quoted above.

In sum, to apply the medical malpractice cap into an EMTALA action would impose a judge-made limitation not called for by the statute.

B. Reduction on Future Damages to Present Value

1.

Botsford, citing Michigan law, M.C.L. § 600.6306, asks the Court to reduce "all future damages to present value." This section provides:

> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
> (d) All future medical and other health care costs reduced to gross present cash value.
> (e) All future noneconomic damages reduced to gross present cash value.
> (f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(internal footnote omitted).

2.

This need not be done for the following reasons:

1. The requirement is a procedural requirement; EMTALA does not require the Court to follow procedural limitations of state law.

2. The jury instructions as to noneconomic damages to the survivors of Kelly Smith did not contain a temporal element. Rather, the instructions asked the jury to establish the loss suffered by the survivors as a result of Smith's death directly.

3. Botsford belatedly raised the issue of the difference between past and future

noneconomic damages at the conclusion of the trial and argued for a jury instruction in a manner that did not allow for meaningful consideration. It did not cite the statute but rather asked that the jury perform the function.

In short, the argument Botsford makes is an academic one. It appears that the manner and the way in which the argument was put forth was more tactical than sincere.

IV. Conclusion

For the reasons stated above, Botsford's motion to alter or amend the judgment is DENIED.

SO ORDERED.

s/_____
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: **FEB 09 2004**

Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

WILLIE SMITH,
Personal Representative
of the Estate of
Kelly Snider Smith,

Plaintiff, Case Number: 00-71459

v. Honorable Avern Cohn

BOTSFORD GENERAL HOSPITAL,

Defendant
_____/

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the plaintiff and against the defendant in the amount of five million thirty-five thousand dollars ($5,035,000.00).

Pursuant to Rule (77d), FRCivP
Copies have been mailed to:

Marc Lipton, Geoffrey Fieger and
Linda Galbraith

Date May 01 2003 David Weaver, Clerk of Court

s/_____
JUDY CASSADY Deputy Clerk

No. 04-1436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREA SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF KELLY SNIDER SMITH, DECEASED,	)	Filed Nov 22, 2005
Plaintiff-Appellee,	)	LeonardGreen
v	)	Clerk
BOTSFORD GENERAL HOSPITAL	)	
Defendant-Appellant.	)	ORDER

BEFORE: GIBBONS and COOK, Circuit Judges; and PHILLIPS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____
Leonard Green, Clerk

*Hon. Thomas W. Phillips, United States District Judge

for the Eastern District of Tennessee, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT, SOUTHERN DIVISION
OF MICHIGAN

WILLIE SMITH,
Personal Representative of the
Estate of Kelly Snider Smith, Deceased,

Plaintiff,

v
BOTSFORD GENERAL HOSPITAL, a Michigan Non-Profit Corporation,

Case No: 2000-
HON:
Magistrate

Defendant.
_____/

MARC LIPTON (P43877)
JODY LIPTON (P49001)
LIPTON LAW CENTER, P.C.
18930 W. 10 Mile Rd. #3000
Southfield, MI 48075
(248) 557-1688
_____/

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the Complaint.

COMPLAINT AND JURY DEMAND

NOW COMES Plaintiff, by and through counsel, and for his complaint against these Defendants, states as follows:

COMMON ALLEGATIONS

1. Plaintiff's Decedent, Kelly Snider Smith was a citizen of the City of Detroit, Wayne County, Michigan.

2. Defendant, Botsford General Hospital is a Michigan non-profit health care corporation, doing business in the County of Oakland, State of Michigan, and is a participating hospital within the meaning of Sec. 1866 of the Social Security Act, and has entered into a medicare agreement under that Section of the Act.

3. Jurisdiction is proper in this Court, as this claim represents a Federal question pursuant to 42 USC 1395 dd.

4. On October 10, 1998, Plaintiff's Decedent, Kelly Snider Smith was involved in a motor vehicle accident at the intersection of Lahser Road and Vassar in the City of Detroit. Said motor vehicle accident occurred on or about 2:45 a.m.

5. In said motor vehicle accident, Plaintiff's Decedent sustained multiple injuries, including but not limited to, simple pelvic and comminuted distal femur fractures.

6. The Plaintiff's Decedent was transported to Botsford General Hospital, arriving at or about 3:00 a.m.

7. Upon arrival at Botsford General Hospital, Plaintiff's Decedent was diagnosed with a pelvic fracture and open femur fracture. Further, Plaintiff's Decedent's vital signs were obtained, and included:

- Alert and oriented x3;
- Pulse 120;

- Respirations 40;
- Blood pressure 108/44.

8. At or about 3:20 a.m., Plaintiff's Decedent was seen by Dr. Parmely, consulting physician, and he recommended transporting the patient to the University of Michigan Hospital due to BGH's inability to perform a CT scan of the patient. At or about the time of the consultation, the Plaintiff's Decedent's vital signs included:

- Pulse 120;
- Respirations 18;
- Blood pressure 139/65.

9. Over the next two hours and ten minutes, while Plaintiff's Decedent remained in BGH's emergency department, the Plaintiff's Decedent's condition deteriorated:

1. At 3:30 a.m., Plaintiff's Decedent was restless and agitated;
2. At 3:45 a.m., Plaintiff's Decedent became increasingly restless and his leg required pressure dressing to control hemorrhage;
3. At 4:10 a.m., the Plaintiff's Decedent's vital signs had changed to include a pulse of 126, respirations of 18, and blood pressure of 101/67.
4. At 5:15 a.m., the patient was becoming increasingly restless. At that time, his vital signs included a pulse of 130, respirations of 20 and a blood pressure of 71/50.

10. At or about 5:30 a.m., the Plaintiff's Decedent was seen by EMT paramedic, Amy Zappa who arrived and examined the patient.

11. At her arrival, EMT Zappa found that Plaintiff's Decedent's vital signs had continued to deteriorate as set forth herein:

- Blood pressure was unable to be obtained;
- Pulse rate was 120 and weak;
- Respiration was 34 and labored;
- Pulse oximeter reading was 93%.

12. Furthermore, at the time of the examination by EMT Zappa, it was apparent that the Plaintiff's Decedent had not received blood, had inadequate fluids, had received inadequate splinting of his fracture, and received inadequate pressure dressing of his wound which was continuing to hemorrhage copious amounts of blood.

13. Despite Plaintiff's Decedent's apparent instability, and the failure of Defendant BGH to stabilize the patient, EMT paramedic Zappa was ordered by Dr. Schell of Defendant BGH to transfer the Plaintiff's Decedent to the University of Michigan Hospital.

14. During transfer, Plaintiff's Decedent went into cardiac arrest, as a direct and proximate result of the blood loss attributable to the comminuted fracture sustained in the early morning motor vehicle accident.

15. As a direct and proximate result of Plaintiff's Decedent's death, Plaintiff's Decedent's survivors have suffered the following damages, among others:

a. Funeral and burial expenses;

b. Reasonable value of compensation for the loss of enjoyment, pain and suffering and other harm to Plaintiff's Decedent;

c. Losses suffered by Kelly Snider Smith's family as permitted under the Michigan Wrongful Death Act including all economic and non-economic losses.

COUNT I

VIOLATION OF THE EMERGENCY MEDICAL TREATMENT ANDACTIVE LABOR ACT (EMTALA)

16. Plaintiff realleges and reincorporates all prior allegations as if fully set forth herein.

17. At all relevant times, Plaintiff's Decedent was an individual within the meaning of 42 USC 1395 dd (b)(1).

18. At the date and time referenced above, Plaintiff's Decedent came to Defendant's Emergency Department and requested an examination and/or treatment for a medical condition.

19. Plaintiff's Decedent's condition, at the time of arrival and during his time at BGH's emergency department, was suffering from an emergency medical condition pursuant to 42 USC 1395 dd(b)(1).

20. Defendant Botsford General Hospital operated the hospital emergency department within the meaning of 42 USC 1395 dd(b)(1), and further Defendant holds itself out as having the ability to

stabilize an individual such as Plaintiff's Decedent, suffering from same or similar medical conditions.

21. Defendant's Emergency Department physicians and consultants performed a screening examination and determined that Plaintiff's Decedent's condition was an emergency medical condition within the meaning of the Act.

22. Defendants transfer of Plaintiff's Decedent at or about 5:45 a.m., was an inappropriate transfer within the meaning of 42 USC 1395 (c)(1) for one or more of the following reasons so far as is presently known:

A. Plaintiff's Decedent's condition was not stabilized within the meaning of 42 USC 1395 (dd)(e)(3)(b);

B. Defendants did not inform Plaintiff's Decedent, or those legally responsible persons acting on his behalf, of the Defendants' obligations under the EMTALA and the risks of transfer;

C. The Defendants failed to provide the medical treatment within its capacity to minimize the risks of transfer to Plaintiff's Decedent's health;

D. The Defendants failed to call for and utilize appropriate transfer equipment and send medically qualified personnel on the transport to reduce the risk to Plaintiff's Decedent of the transport;

E. Defendants failed to re-assess the patient at the time of discharge and confirm that the patient's condition had been stabilized and that he was an appropriate candidate for transfer.

F. Other violations as shall be revealed in discovery.

23. Defendants' conduct and actions outlined above pose an immediate and serious threat to the health, safety and welfare of Defendants' patients and the general public.

24. Defendants' violations of the EMTALA, as outlined above, is a direct and proximate cause of Plaintiff's Decedent's subsequent death, entitling Plaintiff's Decedent to damages and equitable relief as appropriate.

WHEREFORE, Plaintiff requests that this Court:

A. Enter judgment against the Defendants in an amount appropriate to compensate Plaintiff's Decedent's estate and Plaintiff's survivors for the injuries sustained by Plaintiff as a result of Defendants' violation of the EMTALA;

B. Equitable relief, as appropriate, including but not limited to an order to the Secretary of Health and Human Services to request an appropriate utilization of quality control peer review of the conduct of Defendants with regard to the treatment received by Plaintiff's Decedent and with regard to the treatment of all patients in Defendants' emergency department whose health, safety and welfare may be jeopardized by the conduct

exemplified by the treatment received by Plaintiff's Decedent.

Respectfully submitted,

s/_____
MARC LIPTON (P43877)
Attorney for Plaintiff
18930 W. Ten Mile Rd. #3000
Southfield, MI 48075
(248) 557-1688

Dated: March 21, 2000

JURY DEMAND

Plaintiff hereby demands trial by jury in reference to the above-entitled matter.

Respectfully submitted,

s/_____
MARC LIPTON (P43877)
Attorney for Plaintiff
18930 W. Ten Mile Rd. #3000
Southfield, MI 48075
(248) 557-1688

Dated: March 21, 2000

42 U.S.C. § 1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) of this section and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B) of this

section), the hospital may not transfer the individual unless--

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or-

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer--

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility--

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who--

(i) signs a certification under subsection (c)(1)(A) of this section that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section, is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a-7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under

this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a–7a of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of

the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with peer review organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1) or in terminating a hospital's participation under this subchapter, the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part B of subchapter XI of this chapter) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (1) and shall provide a period of at least 60 days for such review. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall also request such a review before making a compliance determination as part of the process of terminating a hospital's participation under this subchapter for violations related to the appropriateness of a medical screening examination, stabilizing treatment, or an appropriate transfer as required by this section, and shall provide a period of 5 days for such review. The Secretary shall provide a copy of the organization's report to the hospital or physician consistent with confidentiality requirements imposed on the

organization under such part B of subchapter XI of this chapter.

(4) Notice upon closing an investigation

The Secretary shall establish a procedure to notify hospitals and physicians when an investigation under this section is closed.

(e) Definitions

In this section:

(1) The term "emergency medical condition" means--

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions--

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means a hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment

of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1395x(mm)(1) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

M.C.L. 600.1483. Medical malpractice action; noneconomic loss damages

Sec. 1483. (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(*i*) Injury to the brain.

(*ii*) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering,

inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

No. 05-1086

IN THE

Supreme Court of the United States

ANDREA SMITH, Personal Representative of the Estate of Kelly Snider Smith, Deceased,

Petitioner,

v.

BOTSFORD GENERAL HOSPITAL, a Michigan Non-Profit Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT G. KAMENEC
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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Michigan's cap on noneconomic medical malpractice damages applies to this failure-to-stabilize EMTALA judgment, pursuant to Congress' allowance of only "damages available for personal injury under the law of the State," 42 U.S.C. § 1395dd(d)(2)(A)?

II.

Whether application of Michigan's cap on noneconomic medical malpractice damages violates the Seventh Amendment to the United States Constitution?

III.

Whether application of Michigan's cap on noneconomic medical malpractice damages violates the equal protection clause of the United States Constitution?

CORPORATE DISCLOSURE

Respondent, Botsford General Hospital, has no parent corporation and no publicly held company owns 10% or more of its stock.

There is a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome. American Continental Insurance Company (ACIC) issued a liability insurance policy to Botsford General Hospital which applies to the Judgment in this action. ACIC became a subsidiary of, and later merged into, St. Paul Fire & Marine Insurance Company, which is now a wholly-owned subsidiary of St. Paul Travelers Insurance Company.

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INTRODUCTION

The United States Court of Appeals for the Sixth Circuit held that state law damages caps apply to actions brought under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, by virtue of the Act's state-law damages incorporation clause, 42 U.S.C. § 1395dd(d)(2)(A) ("obtain those damages available for personal injury *under the law of the State in which the hospital is located* . . ." (emphasis supplied)). Petitioner does not dispute this ruling. The Sixth Circuit then held, as a matter of first impression, that Michigan's medical malpractice damages cap, in particular, applies to this failure-to-stabilize EMTALA action, in which Petitioner questioned the medical judgment and decision-making of Botsford General Hospital ("Botsford"). Not surprisingly, no other circuit court of appeals has addressed whether Michigan's specific medical malpractice damages cap applies to a failure-to-stabilize EMTALA case. The only other circuit court decision to address the application of a state's medical malpractice damages cap to an EMTALA case is in accord with the Sixth Circuit's decision here. *Power v. Arlington Hospital Assoc.*, 42 F.3d 851, 862-64 (4th Cir. 1994). The lack of a conflict between the circuit courts, indeed the lack of attention in the circuit courts, on the damages cap issue in this case is one compelling reason for this Court to deny Petitioner's petition for writ of certiorari. S.Ct.R. 10(a).

Petitioner tries to create the impression of a conflict by arguing that the Sixth Circuit's decision is at odds with other circuit court decisions holding that EMTALA liability is distinct from state common law negligence and medical malpractice liability. But the Sixth Circuit did not hold that EMTALA liability equals medical malpractice liability. It held only that this failure-to-stabilize EMTALA case, which was also filed as a self-styled claim for "medical malpractice" in state court, involved a claim for medical malpractice under Michigan law.

Petitioner's primary argument for this Court's review is therefore without merit.

The Sixth Circuit correctly held that the application of Michigan's damages cap to this EMTALA case does not implicate a protected jury right and therefore does not offend the Seventh Amendment to the United States Constitution. No other circuit has addressed (or is likely to ever address) this question, which is specific to Michigan's medical malpractice damages cap. The Sixth and Fourth Circuits, only, have addressed, and subsequently rejected, the broader argument that application of a state damages cap violates the Seventh Amendment. *Smith v. Botsford*, 419 F.3d 513, 519 (6th Cir. 2005); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989). The Sixth Circuit also correctly rejected Petitioner's equal protection challenge. Applying the rational relation test and ruling consistent with Michigan precedent, the Court found a legitimate governmental interest which justifies Michigan's damages cap. Petitioner fails to identify any conflicting circuit court decisions and fails to otherwise demonstrate that these constitutional questions have not been, but should be, settled by this Court. S.Ct.R. 10(a) and (c). Her petition therefore should be denied.

STATEMENT OF THE CASE

Introduction

This is an action brought under EMTALA, 42 U.S.C. § 1395dd[1], in which Petitioner, Andrea Smith, Personal Representative of the Estate of Kelly Snider Smith, Deceased ("Petitioner"), contends that Botsford failed to stabilize Mr. Smith's "emergency medical condition," an open left femur fracture, before transfer of Mr. Smith to the University of Michigan Medical Center. The only theory presented at the time

1. The District Court had subject matter jurisdiction by virtue of 28 U.S.C. § 1331.